FILE COPY

Office-Supreme Court, U.S.
FILED
AUG 22 1958
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 801

JAMES J. FLYNN,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE SUPREME COURT OF TENNESSEE.

W. E. HENDRIX,
Columbian Mutual Tower,
Memphis, Tennessee,
Attorney for Petitioner, James J. Flynn.

Of Counsel:

JOHN M. HEISKELL,
Commerce Title Building,
Memphis, Tennessee.

E. L. MERGENTHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-2030

INDEX

Petition for Writ of Certiorari Directed to the Supreme Court of Tennessee 1
Principal Question Involved 2
Constitutional Provisions and Statutes of the State of Tennessee 3
Summary Statement of Matters Involved 4
Argument 5

Appendix—

Order Sustaining Demurrer to Plea in Abatement and Disallowing Plea in Abatement A1
Sentence Imposed June 24, 1957, in Criminal Court of Shelby County, Tennessee A2
Text of Opinion of Supreme Court of Tennessee Filed April 9, 1958, As Published in 313 Southwestern Reporter, Second Series, Page 248 ..... A3

Table of Authorities

Cases

Kelly v. *Byington*, (1947) 185 Tenn. 421 ..... 6, 7
McGinnis v. *State*, (1848) 28 Tenn. 43-50, cited in *Barr Assn.* v. *Vick*, (1956) 290 S. W. 2d 871-876 7
Micholson v. *King*, 190 Tenn. 575 7
Price v. *State*, (1956) 199 Tenn. 346 8
Ransom v. *The State*, (1905) 116 Tenn. 355, at 361 ..... 8, 9
Reece v. *Georgia*, 350 U. S. 8, 100 L. Ed. 77 ..... 5, 9
Ridout v. *State*, 161 Tenn. 248 9
Roberts v. *State*, 147 Tenn. 328 7

Constitution and Statutes

Art. 1, Sec. 14, Constitution of Tennessee 3
Art. 11, Sec. 8, Constitution of Tennessee 3, 6
Fourteenth Amendment to the Constitution of the United States, Section 1 2
Sec. 40-1501, Tenn. Code Anno. 3, 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No.

JAMES J. FLYNN,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE SUPREME COURT OF TENNESSEE.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, James J. Flynn, respectfully petitions this Honorable Court for a writ of certiorari to the Supreme Court of Tennessee.

The opinion of the Supreme Court of the State of Tennessee in this case is styled "James J. Flynn vs. State of Tennessee", and is reported in 313 Southwest 2d, at page 248. A copy of the opinion is appended to this petition.

The jurisdiction of this Court is invoked because in the case in which review is sought, the Supreme Court of Tennessee has decided a Federal question of substance not theretofore determined by this Court, and has decided it in a way not in accord with applicable decisions of this Court.

The question involves the application of the Fourteenth Amendment, Section 1, to the Constitution of the United States, which, insofar as it is applicable, provides,

"* * * nor shall any state deprive any person of * * * liberty * * * without due process of law."

The judgment sought to be reviewed was rendered by the Tennessee Supreme Court on April 9, 1958, and entered of record on said date. Order entered July 3, 1958, in this Court extending time until August 22, 1958, within which to file this Petition for Certiorari.

The statutory provision relied on to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is Section 1257 (3), Title 28, United States Code Annotated.

PRINCIPAL QUESTION INVOLVED.

The only question involved is whether it is violative of the Due Process Clause of the Fourteenth Amendment, Section 1, to the Constitution of the United States for the State of Tennessee to put petitioner, James J. Flynn, to trial on an indictment charging him with murder in the second degree when said indictment was returned by a Grand Jury which was not selected and formed in the manner prescribed by the General Statutes of Tennessee.

CONSTITUTIONAL PROVISIONS AND STATUTES OF THE STATE OF TENNESSEE.

The Constitution of the State of Tennessee provides,

"That no person shall be put to answer any criminal charge but by presentment, indictment or impeachment."

Art. 1, Sec. 14, Constitution of Tennessee.

"*Sec. 8. General laws only to be passed.*—The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie (immunities), or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law. * * *"

Art. 11, Sec. 8, Constitution of Tennessee.

The Tennessee statute, the law of the land in Tennessee, provides—

"*Drawing of names.*—To form the grand jury, the court shall direct the names of the jurors in attendance to be written on scrolls, and placed in a box or other suitable receptacle, and drawn out by a child under ten (10) years of age, or the Judge, and the twelve (12) whose names are first drawn shall be a grand jury for the term."

Tenn. Code Anno., Vol. 7, Sec. 40-1501.

SUMMARY STATEMENT OF MATTERS INVOLVED.

The Supreme Court of Tennessee in its opinion (Tr. pp. 59-60 and Appendix p. A3) concisely and precisely summarized the matters involved as follows:

> "The facts are not controverted on this appeal. The only question presented is whether or not the Grand Jury of Shelby County was empanelled in a Constitutional manner. Able counsel for the plaintiff-in-error avers that the method of empanelling the Grand Jury of Shelby County is contrary to Code Sec. 40-1501, T. C. A., and, therefore, it violated Art. 11, Sec. 3, of the Tennessee Constitution, that is, the method of empanelling the Grand Jury in other counties of the state.
>
> "To the indictment the plaintiff-in-error first filed a plea in abatement. To this plea in abatement, the state demurred. The trial Court sustained the demurrer and then the jury was empanelled according to law and the man tried.
>
> "The plea in abatement alleged that the grand jurors were individually selected and designated by the Judge of Division I of the Criminal Court of Shelby County. The Court did not direct that the names of the jurors submitted to him by the Jury Commissioners be written on scrolls and placed in a box or other suitable receptacle and drawn out by a child ten years of age or the Judge, and then designate the twelve whose names were first drawn as the Grand Jury for the January, 1957, term."

The assignment of error upon which the case was heard before the Supreme Court of Tennessee reads as follows:

> "The Court erred in sustaining the demurrer to the plea in abatement and in refusing to abate the in-

dictment charging James J. Flynn with murder in the second degree."

Brief on behalf of the appellant, James J. Flynn, Tr. p. 26.

In disallowing petitioner's plea in abatement and sustaining the State's demurrer thereto, the trial Judge in his order (Tr. p. 11) used the following language, to-wit:

"* * * The Court being of the opinion that the Grand Jury returning the indictment for murder in the second degree against the defendant, James J. Flynn, was empanelled according to law and was legally empowered under the statutes of Tennessee, the Constitution of Tennessee and the Constitution of the United States of America to return the indictment against the said defendant."

ARGUMENT.

Petitioner's position must stand or fall on *Reece* v. *Georgia*, 350 U. S. 85, 100 L. Ed. 77, wherein this Court used the following language:

"This Court over the past fifty years has adhered to the view that valid grand-jury selection is a constitutionally protected right." (p. 87).

The general law of the land in Tennessee is that all grand juries shall be selected by lot. Sec. 40-1501, Tenn. Code Anno.

Admittedly the grand jury here was not selected by lot, but was selected and appointed by the Judge of Division I of the Criminal Court of Shelby County. There is no statute, general or special, authorizing the selection of a grand jury in this manner in Shelby County, Tennessee.

A statute, a custom or a bald assumption of power assuming the right to so appoint a grand jury would be in

violation of the Constitution of Tennessee, Article 11, Sec. 8.

Here reliance is placed on *Kelly* v. *Byington*, (1947) 185 Tenn. 421. There, in a suit for a declaratory judgment, a private or special act of the Tennessee legislature applicable to Knox County was held invalid because it conflicted with the general statute, the law of the land in Tennessee. The special act provided that costs in the General Sessions Court of Knox County must be prepaid. The general statute provided that costs in General Sessions Courts of the State need merely be secured.

In its decision the Supreme Court of Tennessee made these pertinent observations:

> "The general law of this State provides that suits may be instituted and process issued upon the giving of security by the party at whose instance the action is brought, and the requirement for the prepayment of costs as specified in the Act here involved is contrary to the general law of this State."
>
> * * * * * * *
>
> "There is no reasonable basis for a different statutory requirement for the circumstances under and by which an individual may institute a suit in one of the courts of lesser jurisdiction in Knox County than the statutory requirement for the circumstances under and by which an individual may institute a suit in a court of like jurisdiction in any other county of the State. The situation being covered by statutes of state-wide application, no sound basis exists for varying such state-wide requirements in a single county.
>
> * * * * * * * *
>
> "The Legislature may group the citizens of this State into different classifications or classify various areas of the State for the purpose of enacting legislation applying to such particular classifications, but such

classifications must be placed upon a reasonable basis."
(185 Tenn. pp. 424-26.)

The Court concludes:

> "The general law sets out the general policy of the State in this situation and it cannot be set aside as to one county unless such discrimination may be justified by some sound reason, which does not appear in the present cause."
> (185 Tenn. at p. 428.)

See also *Micholson* v. *King*, 190 Tenn. 575, wherein the Court held that a special act attempting to vary the method generally prescribed for commencing actions in the Circuit Courts of Tennessee was invalid.

The general law of Tennessee requires that Tennessee Grand Juries be formed by lot and the record reflects no "sound reason" why Grand Juries in Shelby County, Tennessee, should not be so formed.

We submit to the Court that Grand Juries, their function and formation, have heretofore been regarded in Tennessee as a sacred heritage of Magna Charta which would:

> "* * * guarantee to every freeman the great privilege and security of not being put to answer any criminal charge affecting the right to life or liberty without a written accusation, previously verified by the oath of a grand jury, in the form of a presentment or indictment."
> *McGinnis* v. *State*, (1848) 28 Tenn. 43-50, cited in *Bar Assn.* v. *Vick*, (1956) 290 S. W. 2d 871-876.

The Supreme Court of Tennessee, unable to find other grounds upon which to sustain the formation of the grand jury and its indictment in this case, held, despite its assertion to the contrary in *Roberts* v. *State*, 147 Tenn. 328, this to be a *de facto* grand jury which could and did return

a valid indictment. This was the only ground on which the indictment and conviction were sustained.

Opinion Supreme Court, Tr. p. 70, App. p. A3.

It has been consistently held by the Supreme Court of Tennessee for the past fifty years that the proper way to challenge the validity of the formation of a grand jury is, as was done here, by plea in abatement.

> "The indictment was in all respects regular on its face, and could not be invalidated on a mere motion to quash by objections presented to the constitution of the grand jury. Under the practice in this State, such extraneous matters lying beyond the four corners of the indictment should have been presented by a plea in abatement duly verified and sustained by competent evidence."
>
> *Ransom* v. *The State*, (1905) 116 Tenn. 355, at 361.

> "The first assignment of error complains that the trial court was in error in overruling a motion to quash the indictment. This motion undertook to challenge the matter of the selection of the grand jury because of the alleged invalidity of Chapter 427 of the Private Acts of 1917, and Chapter 928 of the Private Acts of 1949.
>
> "(1) This assignment is without merit as the record is regular on its face, and there is nothing to show that the grand jury was made up under the provisions of the statutes attacked.
>
> "(2) In order to raise the question the defendant should have set out all the facts in a sworn plea in abatement. *Ransom* v. *State*, 116 Tenn. 355, 86 S. W. 953."
>
> *Price* v. *State*, (1956) 199 Tenn. 346.

The allegation of the plea in abatement that the grand jury was appointed and not selected by lot having been admitted by the State's demurrer, there was, of course, no

necessity of proof being offered to sustain petitioner's position.

The leading case in Tennessee on the doctrine *de facto* is *Ridout* v. *State*, 161 Tenn. 248, and there the exceptions to the doctrine are declared, as summarized in headnote 15 at page 251, to be:

> "15. *OFFICERS. De facto officers. Exceptions to general rule.*
>
> "The exceptions recognized in the application of the general rule with respect to *de facto* officers are: (1) where the attack was direct, (2) where the legality of the Court was denied, (3) where the original entry of office was forcible or fraudulent, (4) where the act, or exercise of the office, was single, continuity being lacking, (5) where the assumption of office was in bad faith, with knowledge of infirmity of authority by the person undertaking to act and by the public, (6) where a judge *de jure* was in actual present possession of the office. (Post. p. 270)."

The doctrine *de facto* must fail in this case because (1) this is a direct attack on the validity of the grand jury made in the manner prescribed by law (*Ransom* v. *State* and *Reynolds* v. *State*, both *supra*), and (2) because there is nothing in this record to show continuity—that this Grand Jury ever returned any other indictment against any other person.

If this is not a direct attack on the validity of the grand jury and its selection, there is in Tennessee no way to make a direct attack thereon after indictment. Thus every grand jury formed under color of authority, no matter how selected or of whom composed, which returns an indictment must be considered *de facto* and its acts valid. Such an approach renders *Reece* v. *Georgia*, *supra*, meaningless and futile. This cannot be

Your petitioner, therefore, respectfully submits to this Court that a Writ of Certiorari should issue out of the Supreme Court of the United States to the Supreme Court of Tennessee taking jurisdiction of this case.

Respectfully submitted,

W. E. HENDRIX,
Columbian Mutual Tower,
Memphis, Tennessee,
Attorney for Petitioner, James J. Flynn.

Of Counsel:

JOHN M. HEISKELL,
Commerce Title Building,
Memphis, Tennessee.

ORDER SUSTAINING DEMURRER TO PLEA IN ABATEMENT AND DISALLOWING PLEA IN ABATEMENT.

"STATE OF TENNESSEE

VS.

76000-01

Order.

This matter came on to be heard on the plea in abatement of the defendant, James J. Flynn, and a demurrer to said plea in abatement filed by the State of Tennessee, the argument of counsel and the entire record of the cause; and the Court being of the opinion that the Grand Jury returning the indictment for murder in the second degree against the defendant, James J. Flynn, was empanelled according to law and was legally empowered under the statutes of Tennessee, the Constitution of Tennessee and the Constitution of the United States of America to return the indictment against the said defendant.

It is, therefore, ORDERED, ADJUDGED and DECREED that the demurrer on behalf of the State of Tennessee to the plea in abatement filed by the defendant, James J. Flynn, be and the same hereby is sustained and the plea in abatement be and the same is hereby overruled and disallowed.

To all of which the defendant, James J. Flynn, excepts.

/S/ Sam D. Campbell
Judge

O. K.

ROBERT K. DWYER
Assistant Attorney General

O. K.

JOHN M. HEISKELL
Attorney for Defendant

Enter May 1, 1957."
(Tr. pp. 11-12.)

SENTENCE IMPOSED JUNE 24, 1957, IN CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE.

"STATE OF TENNESSEE
VS. 76000
JAMES J. FLYNN

Murder in the Second Degree.

Comes the Attorney General on the part of the State and the defendant in proper person and by counsel of record, whereupon there comes on to be heard defendant's motion for a new trial herein, which motion having been heard and fully understood by the Court is overruled and the Court proceeds to pass sentence which is that he be taken by the Sheriff and remanded to Jail and at his earliest convenience delivered to the KEEPER OF THE WORKHOUSE, therein to be confined at hard labor for a period of SIX MONTHS, and that he pay the cost of this prosecution for which let mittimus and execution issue. Thereupon, the defendant prayed an appeal to the next term of the Supreme Court sitting as Nashville, Tennessee, for the Western Division of the State, which appeal is granted and the defendant is allowed thirty days in which to file his Bill of Exceptions and perfect said appeal. It is further ordered by the Court that the appeal bond in the above cause remain the same.

/S/ Sam D. Campbell
JUDGE"

(Tr. pp. 19-20.)

TEXT OF OPINION OF SUPREME COURT OF TENNESSEE FILED APRIL 9, 1958, AS PUBLISHED IN 313 SOUTHWESTERN REPORTER, SECOND SERIES, PAGE 248.

BURNETT, Justice.

Flynn was indicted for second degree murder. This killing arose out of an automobile accident in which Flynn was operating a car under the influence of alcohol. For this crime he was found guilty of involuntary manslaughter and sentenced to six months in the County Workhouse.

The facts are not controverted on this appeal. The only question presented is whether or not the grand jury in Shelby County was impaneled in a constitutional manner. Able counsel for the plaintiff in error avers that the method of impaneling the grand jury of Shelby County is contrary to Code Section 40-1501, T.C.A., and, therefore, it violated Article XI, Section 8, of the Tennessee Constitution, that is the method of impaneling the grand jury in Shelby County is contrary to the general law providing for their impaneling in other Counties of the State.

To the indictment the plaintiff in error first filed a plea in abatement. To this plea in abatement, the State demurred. The trial court sustained the demurrer and then the jury was impaneled according to law and the man tried.

The plea in abatement alleged that the grand jurors were individually selected and designated by the Judge of Division I of the Criminal Court of Shelby County. The Court did not direct that the names of the jurors submitted to him by the jury commissioners be written on scrolls and placed in a box or other suitable receptacle and drawn out by a child of ten years of age or the Judge,

and then designate the twelve whose names were first drawn as the grand jury for the January, 1957, Term.

For a complete understanding of the issues and the conclusions that we have reached it is necessary that at least a brief legislative history of the various enactments concerning the establishment, duties and powers of the Criminal Court of Shelby County be enumerated.

Chapter 35, Acts of 1843-1844, established a Criminal Court in the City of Memphis. Section 4 of that Act provided in part:

> "That the Judge of said court shall, from time to time, appoint a Grand and two Petit Juries to attend said Court, * * *."

The Legislature of 1853-1854, by Chapter 13, passed another Act establishing a criminal court for Memphis and Shelby County. By section 5, this latter Act provided in part as follows:

> "That the Judge of said court, from time to time, shall appoint a grand and two petit juries, to attend said court, * * *."

This Act was codified and carried in the Code of 1858 as Sections 4250 and 4253.

The Legislature of 1869-1870 by Chapter 28 of the Acts of said bodies passed an Act reorganizing the courts of Shelby County.

Judicial circuits were created throughout the State by Chapter 31 of the Acts of 1870. Section 2 provided that the Criminal Court of Shelby County established by the reorganization Act of 1869-1870 should, "* * * remain the same as now established by law, * * *."

An extraordinary Session of the Legislature of 1885 again divided into judicial circuits and chancery divisions

the courts of Shelby County and created a special criminal court for that County to deal with the criminal cases arising in the County. A similar provision is carried in Chapter 427 of the Acts of 1899.

The Criminal Courts of Shelby County were reorganized again by Chapter 351 of the Acts of 1907. This Act created Division II of the Court which was given jurisdiction over misdemeanors. Division I of the Court was authorized to charge the grand jury and to receive its reports. This Act was amended by Chapter 445 of the Acts of 1909, which conferred the same jurisdiction upon Division II as had previously been granted Division I, but gave Division I authority to charge the grand jury and to receive its reports, and authorized the Judge of Division II to discharge duties concerning the grand jury in the absence or disqualification of the Judge of Division I.

By Chapter 230 of the Acts of 1905 the General Assembly created a jury commission applicable to Shelby County. This Act was practically the same as that of Chapter 124 of the Acts of 1901 which was applicable to Davidson and Shelby Counties. The 1905 Act authorized the Judge of the Criminal Court to impanel the grand jury. Section 16 of this Act provides that in the absence of fraud no irregularity with respect to the provisions of the chapter shall affect the validity of the actions of the grand jury provided there has been a substantial compliance with the chapter.

This Act was amended in 1929 by Chapter 633 of the Private Acts of that year so that the Judge would be required to impanel the grand jury by lot substantially in the same manner as is now provided by Section 40-1501, T.C.A. However, by Chapter 447, Private Acts of 1931, this Private Act, Chapter 633 of the Private Acts of 1929, was repealed.

The reason that the latter two Acts are cited is to indicate the construction which the General Assembly placed upon the Jury Commission Act of 1905 above referred to. Apparently this body understood that the law required the Judge of the Criminal Court of Shelby County to appoint grand juries under the law. Otherwise, the General Assembly would not have found it necessary to enact Chapter 633 of the Private Acts of 1929 which required the Judge to impanel the jury substantially in accordance with Code Section 40-1501, T.C.A. The matter, though, being brought to their attention apparently they were dissatisfied with the requirements of this Act because two years later the Act was repealed. Therefore, it seems that the General Assembly construed the Shelby County Jury Act of 1905 as authorizing and directing that the Criminal Judge of Division I of the Criminal Court of Shelby County to appoint the members of the grand jury.

It is argued, and very reasonably so, that when it appears that Code Section 4253 of the 1858 Code was never repealed by any enactment except that of Chapter 633 of the Private Acts of 1929 which Act in itself was later repealed that this Code Section which is applicable to Shelby and Davidson and other Counties authorizing the Judge to appoint the grand jurors was then left in force. This Code Section of 1858, Code (4253) was not carried forward into the Code of 1932 or the present Tennessee Code Annotated but it is said, forcefully so by the State, that such an Act concerning special courts need not be codified and that the enactment of the new Code did not intend to repeal such Acts.

It is argued by the plaintiff in error that by the enactment of Chapter 28 of the 1869-1870 Act that this abolished the Criminal Courts of Shelby County and thereby denuded this Court of all of its special powers. This is

the Act above referred to which reorganized all the Courts of Shelby County. This Act (Chapter 28 of the Acts of 1869-1870) does not in any way refer to Section 4253 of the Code of 1858 which authorized the Criminal Courts of Shelby, Davidson and Montgomery Counties for the Judge to appoint the grand jurors. Since no reference is made to this Code Section in either the caption or the body of the Act, the argument obviously is made that this Act as repealed the Code Section referred to by implication. This Court rejected a similar argument in regard to the power of the Criminal Judge of Davidson County in the case of *Balden* v. *State*, 122 Tenn. 704, 127 S.W. 134, where the Court very forcefully and on good authority adheres to the doctrine that repeals by implication are not favored.

In the Balden case it was contended that the Davidson County Jury Commission Law deprived the Criminal Judge of the power to appoint grand jurors, but this Court held that the power in Section 4253, Code of 1858, had not been repealed in 1909. The practice of criminal judges appointing grand jurors has been approved in this State in the cases of *Harris* v. *State*, 100 Tenn. 287, 45 S.W. 438; *Balden* v. *State, supra;* and *State* v. *Edwards*, 174 Tenn. 542, 129 S.W.2d 199.

[1] In view of this legislative history, of the cases of this Court above cited construing such Acts, and particularly in view of the fact that the opinion in *Harris* v. *State*, referred to the Acts which were passed concerning the Shelby County Court when as a matter of fact the Act being construed in that case was the Act concerning the Davidson County Court it was a natural thing (both Acts were in substance the same) for the Criminal Judges of Shelby County to impanel their grand juries as they did and not to comply literally with Section 40-1501, T.C.A. Instead of placing this decision on the construction and in-

terpretation of these Acts, and it is entirely possible that it might be done, we have concluded that without the question of a doubt that the impaneling of the grand jury as was done in this case in Shelby County constituted a *de facto* grand jury at least. And acts of such a grand jury which are not tainted with fraud are valid.

[2] Section 40-1501, T.C.A., began with the Acts of 1779, Chapter 6, Section 12, and was carried as it is today with the exception of some very slight modifications in the Code of 1858. This Code Section (40-1501, T.C.A.) is merely directory and not mandatory. *Workman* v. *State*, 36 Tenn. 425; *Pybos* v. *State*, 22 Tenn. 49; *Epperson* v. *State*, 73 Tenn. 291.

[3] It is well recognized that:

> "* * * where the provisions of the statute are merely directory, and particularly where the chief purpose of the prescribed method is to distribute equally the burden of jury service, a departure from that method does not, in the absence of fraud or prejudice to the interests of the party who questions the regularity of the selection, render the grand jury illegal. The reason for this rule is that since the grand jurors do not try the case, but merely charge the accused, the manner of their selection is of no consequence to him; he is entitled to claim only fair and impartial grand jurors who possess the necessary qualifications, whereas it is of great consequence that the administration of justice shall not be delayed by mere technical objections." 24 Am. Jur., p. 845, Sec. 19.

This language is almost the verbatim language used by the Circuit Court of Appeals in the case of *United States* v. *Glasser*, 7 Cir., 16 F.2d 690, which was affirmed by the Supreme Court of the United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680.

"Under the common law, an accused person may interpose many technical objections to an indictment and to the organization o the grand jury by which it was found, even though th y are wholly devoid of substantial merit. These over efined technicalities are the outgrowth of a system of c iminal law of unreasonable severity, and of a humane desire on the part of courts to shield those charged with crime from excessive and cruel punishment." 24 Am. Jur., p. 850, Section 26.

The cases last above of *Workman*, *Pybos*, and *Epperson* v. *State*, reject these old technical arguments that were advanced in the early stages for the reason just said in the last quotation of American Jurisprudence, because these reasons do not now lie. Most, if not all modern cases indicate that any departure as here from a statutory requirement, where the statute is directory as this is, is not prejudicial to the accused as long as the indictment does nothing to indicate that the indictment was tainted by bias or prejudice by the selecting officer. This Court applied this same reasoning in reference to a petit or trial jury in *Manning* v. *State*, 155 Tenn. 266, 292 S.W. 451.

[4] This record is devoid of any adverse accusations against this grand jury. In a case of the kind here where the accused is not prejudiced, where the grand juries are not incompetent (the trial judge selected these grand jurors from the panel presented by the Jury Commission), where their selection is not corrupt, or where there has been no invasion of any substantial right, substantial compliance is all that is necessary with the laws concerning the impaneling of grand juries. The text, 38 C.J.S., Grand Juries, § 9, p. 996, abundantly substantiates this statement with authorities from Federal and State Courts all over the United States.

[5] It is very earnestly and forcefully argued that the way the grand jury here was impaneled being contrary

to the general law of the State (Section 40-1501, T.C.A.) that it violates Article XI, Section 8 of the Constitution. In support of this argument the case of *Nichols* v. *King*, 190 Tenn. 573, 230 S.W.2d 1006, is cited as controlling and authority for this argument. We must respectfully disagree with counsel because in our judgment the Nichols case is not in point under the facts of the present case. In the present case, the plaintiff in error does not even attempt to demonstrate or point out how his rights had been adversely affected as a result of the appointment of this grand jury by the Criminal Judge. In the Nichols case the plaintiff might have been adversely affected if he had been required to file his declaration a different way from others, thus the difference. In the case at Bar the problem deals with a statute which is procedural only and does not involve a substantive right as did that in the Nichols case. The present case deals with the powers and authority of the specially constituted court operating the Criminal Court of Shelby County, and deals with a Statute (Section 40-1501, T.C.A.) which is directory and not mandatory. We must thus reject this argument.

Then it is said by the plaintiff in error that there is no such thing in Tennessee as a *de facto* grand jury. This statement is based upon a like statement made by this Court speaking through a special Justice, in the case of *Roberts* v. *State*, 147 Tenn. 323, 247 S.W. 101. We have Shepardized the Roberts case down to the present time from the beginning of the Shepard Annotater. It has never been cited from the time it was published until the present, according to Shepard. In the work on Grand Juries in 38 C.J.S., § ., at page 983, the author of that work cites this case, that is *Roberts* v. *State*, *supra*, as the only State case in the United States which says that there is no such thing as a *de facto* grand jury.

We have read and re-read the Roberts case and in our judgment the statement that there is no such thing as a *de facto* grand jury is entirely unnecessary to the decision of the case. We must conclude that such a statement is, insofar as the *de facto* grand jury question is concerned, *obiter dictum*.

[6] The better rule and that which is supported by reason and authority is that there may be a *de facto* grand jury and when such a jury acts in the absence of fraud or prejudice or what-not, its actions are good. As authority for this proposition see *Ex parte Haymond*, 91 Cal. 545, 27 Pac. 859; *People* v. *Petrea*, 92 N.Y. 128, and *State* v. *Wescott*, 194 Wis. 410, 217 N.W. 283, where at page 286 the Supreme Court of Wisconsin says:

> "A grand jury which continues to function and present indictments after the term at which it was called is a de facto grand jury, and its indictments are as valid as those presented by the de jure grand jury." Citing authorities.

The Supreme Court of Michigan in *People* v. *Morgan*, 133 Mich. 550, 95 N.W. 542, reached the conclusion that the grand jury was *de facto* and its indictments were valid.

There are many other cases from various jurisdictions which hold to the same effect. This in effect is holding that the grand jury was a *de facto*, not a *de jure* grand jury and yet those indictments brought in by that *de facto* grand jury are valid. To us this makes sense. No one is done an injustice by this holding.

[7, 8] The statutes regulating the selection of grand juries are enacted for public reasons rather than for the benefit of any individual; they are intended to facilitate the selection of a jury, to equalize the burden of jury service, and to preclude the packing of juries or the selection of

jurors with reference to particular matters and causes likely to be submitted to them for determination. When we look at grand juries from this viewpoint and then take into consideration what a *de facto* officer may do, we can and must readily appreciate that there may and is a *de facto* grand jury which it clearly was in this case. There being no prejudice or bias shown this indictment was valid.

Thus it is for these reasons we must overrule all assignments of error and affirm the judgment of the trial court.

LE COPY

Office Supreme Court, U.S.
FILED
SEP 17 1958
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 301.

JAMES J. FLYNN,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to the Petition for Certiorari.

JAMES M. GLASGOW,
Assistant Attorney General,
Supreme Court Building,
Nashville, Tennessee,
Attorney for the Respondent.

Of Counsel:
GEORGE F. McCANLESS,
Attorney General,
Supreme Court Building,
Nashville, Tennessee.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Opinion below	1
Jurisdiction	3
Question presented	5
Statute involved	5
Statement of the case	5
Argument	7
Conclusion	9

Cases Cited.

Black v. Cutter Laboratories (Cal. 1956), 351 U. S. 292, 76 S. Ct. 824, 100 L. Ed. 1188 3

Culvert v. Chicago (Ill. 1906), 201 U. S. 275, 26 S. Ct. 617 3

Enterprise Irrigating District v. Farmers Mutual Canal Co. (Nebr. 1917), 243 U. S. 157, 37 S. Ct. 318, 61 L. Ed. 644 ..... 3, 4

Epperson v. State (1880), 73 Tenn. 291 8

Herb v. Pitcairn (Ill. 1945), 324 U. S. 117, 65 S. Ct. 459, 89 L. Ed. 789 3

Highland Farms Dairy, Inc., v. Agnew (Va. 1937), 300 U. S. 608, 57 S. Ct. 549 ..... 4, 6

Hyde v. United States (D. C. 1911), 225 U. S. 373, 32 S. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614 7

McCoy v. Shaw (Okla. 1928), 277 U. S. 302, 48 S. Ct. 519, 72 L. Ed. 891 4

Moffat v. United States (8th C. C. A. 1916), 232 Fed. 522 7

Mutual Life Insurance Co. v. McGrew (Cal. 1903), 187 U. S. 291, 309, 23 S. Ct. 375 3

Pybos v. State (1842), 22 Tenn. 49 8

Reece v. State of Georgia (1955), 350 U. S. 85, 76 S. Ct. 167, 100 L. Ed. 77 7

Roberts v. State, 147 Tenn. 328, 247 S. W. 101 8

United States v. Glasser (7th C. C. A. 1940), 116 Fed. 2d 690, Modified on Other Grounds (1941), 315 U. S. 60, 86 L. Ed. 680, 62 S. Ct. 457, Rehearing Denied (1951), 315 U. S. 827, 86 L. Ed. 1222, 62 S. Ct. 629. 7

Wolfson v. United States (5th C. C. A. 1900), 101 Fed. 430 7

Workman v. State (1857), 36 Tenn. 425 8

Wuichet v. United States (6th C. C. A. 1925), 8 Fed. 2d 561, Certiorari Denied (1926), 270 U. S. 651, 46 S. Ct. 351, 70 L. Ed. 781 7

Zucht v. King (Tex. 1922), 260 U. S. 174, 43 S. Ct. 24 3

Statutes Cited.

Tennessee Code Annotated, Sec. 40-1501 ..... 2, 5, 6, 7, 8

Section 1257 (3), Title 28, U. S. C. A. 3

Miscellaneous Cited.

Article XI, Section 8, Constitution of Tennessee 2, 6

Section 1, Fourteenth Amendment, Constitution of the United States 3, 6

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 301.

JAMES J. FLYNN,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to the Petition for Certiorari.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINION BELOW.

In the Criminal Court of Shelby County, Tennessee, the petitioner, James J. Flynn, was convicted of involuntary manslaughter for which he was sentenced to serve six months in the Shelby County Workhouse and the judgment of conviction was affirmed by the Supreme Court of Tennessee (313 S. W. 2d 248).*

* For the text of the opinion, see page 3A, Appendix, Petition for the Writ of Certiorari.

The facts concerning the homicide are not controverted and are immaterial to the question presented for the Court's determination.

In the trial court, Flynn filed a plea in abatement to the indictment averring that the members of the grand jury were appointed from the jury list by the trial judge and not selected by lot as provided by Section 40-1501, Tennessee Code Annotated. The State's demurrer to the plea was sustained by the trial judge. Afterwards, the petitioner was put to trial resulting in the judgment of conviction.

On appeal to the Supreme Court of Tennessee, the petitioner argued that the failure of the trial court to select the grand jurors by lot instead of appointing them violated Article XI, Section 8, Constitution of Tennessee, and was a denial of due process of law under the Fourteenth Amendment of the Constitution of the United States. Rejecting these contentions, the Supreme Court of Tennessee held that:

(1) It is proper for the trial judge to appoint grand jurors where there is statutory authorization (but declined to construe the statutes relating to the authority of the Criminal Court of Shelby County);

(2) Section 40-1501, Tennessee Code Annotated, is directory and not mandatory;

(3) The objection raised as to the organization of the grand jury is technical and devoid of substantial merit;

(4) There is no showing of fraud nor bias; and

(5) Since Section 40-1501, Tennessee Code Annotated, was not literally followed, the grand jury was at least a de facto grand jury and the indictment was valid.

JURISDICTION.

The jurisdiction of this Court is asserted upon the allegation that the Supreme Court of Tennessee has decided a federal question of substance not heretofore determined by this Court, and not in accord with the applicable decisions of this Court.

The petitioner relies upon Section 1257 (3), Title 28, United States Code Annotated, and insists that he has been deprived of his rights in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The opinion of the Supreme Court of Tennessee does not indicate that a substantial federal question nor any federal question was presented for its consideration. Although this Court under such circumstances will assume that a substantial federal question was not raised in the State courts (**Mutual Life Insurance Co. v. McGrew** [Cal. 1903], 187 U. S. 291, 309, 23 S. Ct. 375), the issue was presented by way of argument and brief in the State Supreme Court. Consequently, the conclusion is warranted that the State Court found the federal question to be insubstantial. The result reached by the State Court is correct, and this Court should dismiss the petition for lack of jurisdiction. **Culvert v. Chicago** (Ill. 1906), 201 U. S. 275, 26 S. Ct. 617; **Zucht v. King** (Tex. 1922), 260 U. S. 174, 43 S. Ct. 24.

This Court is without jurisdiction for the additional reason that the state decision rests upon an adequate and independent nonfederal ground. **Black v. Cutter Laboratories** (Cal. 1956), 351 U. S. 292, 76 S. Ct. 824, 100 L. Ed. 1188; **Herb v. Pitcairn** (Ill. 1945), 324 U. S. 117, 65 S. Ct. 459, 89 L. Ed. 789; **Enterprise Irrigating District v. Farmers Mutual Canal Co.** (Nebr. 1917), 243 U. S. 157, 37 S. Ct. 318, 61 L. Ed. 644.

Further, it is immaterial whether the decision of the State Court is right or wrong, since there is no allegation that the State Court adopted its view of the nonfederal question in order to evade a federal constitutional issue. **Enterprise Irrigating District v. Farmers Mutual Canal Co.**, supra. In that case, this Court stated that it is without power to disturb such a judgment.

Neither can the decision of the State Court be reviewed unless the nonfederal ground is unfounded. In **McCoy v. Shaw** (Okla. 1928), 277 U. S. 302; 48 S. Ct. 519, 72 L. Ed. 891, this Court declared:

> "It is settled law that a judgment of a state court which is put upon a nonfederal ground independent of the federal question involved, and broad enough to sustain the judgment, **cannot be reviewed by this court**, unless the nonfederal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of decision upon the federal question" (Emphasis supplied).

Although the foregoing appears sufficient to warrant the dismissal of the petition, another rule of law is invoked to sustain the position of the respondent. The rule has long been recognized that the state courts have absolute power and authority to adjudicate the common law of the state and to construe the state's statutes and constitution. However, the unequivocal language of Mr. Justice Cardozo is quoted as follows:

> "A judgment by the highest court of the state as to the meaning and effect of its own constitution is decisive and controlling everywhere."
>
> **Highland Farms Dairy, Inc., v. Agnew** (Va. 1937), 300 U. S. 608, 57 S. Ct. 549.

The application of the foregoing rule to the case at bar is obvious and a cursory reading of the opinion of the

Supreme Court of Tennessee discloses that the decision rests upon a rational basis in state law and adheres to principles long embedded in the jurisprudence of Tennessee.

QUESTION PRESENTED.

Where a state's highest court has consistently held that a state statute providing for the selection of grand jurors by lot is directory and not mandatory; where the state court found that there had been a substantial compliance with the state's statute; and where there is no allegation nor imputation of fraud nor bias, was the petitioner denied due process of law within the meaning of the Fourteenth Amendment when the petitioner was put to trial on an indictment returned by a de facto grand jury which was appointed by the trial judge instead of having been selected by lot as provided by the state statute?

STATUTE INVOLVED.

The statute involved is Section 40-1501, Tennessee Code Annotated, and is in the following words and figures, to-wit:

> "To form the grand jury the court shall direct the names of the jurors in attendance to be written on scrolls and placed in a box or other suitable receptacle and drawn out by a child under ten (10) years of age or the judge, and the twelve (12) whose names are first drawn shall be a grand jury for the term."

STATEMENT OF THE CASE.

The petitioner, while driving an automobile under the influence of an intoxicating liquor, collided with the automobile of Willie Payne, resulting in his death. The facts concerning the homicide are not disputed. The issue on appeal to the Supreme Court of Tennessee was the question

of law raised by the plea in abatement concerning the selection of the grand jurors under Section 40-1501, Tennessee Code Annotated.

In the Supreme Court of Tennessee, the petitioner argued that the method of empanelling the grand jury in the trial court violated Article XI, Section 8, of the Constitution of Tennessee, because the grand jurors were allegedly selected in a manner contrary to the general law of the State. Since the State's highest tribunal rejected this contention, any question involving the construction and meaning of the State Constitution is foreclosed in this Court. **Highland Farms Dairy, Inc., v. Agnew**, supra.

As here the petitioner also complained in the State Courts that he was denied due process of law under the Fourteenth Amendment of the Constitution of the United States. The sole insistence is that his constitutional rights were violated by being put to trial upon an indictment returned by a grand jury which was not empanelled strictly in accordance with Section 40-1501, Tennessee Code Annotated.

ARGUMENT.

For a number of reasons, the State insists that the Court should deny the writ of certiorari and the petition should be dismissed.

First. In support of his position, the petitioner relies upon **Reece v. State of Georgia** (1955), 350 U. S. 85, 76 S. Ct. 167, 100 L. Ed. 77. The case is authority for the proposition that where there is a systematic exclusion of members of the race of the accused from a grand jury, there is a denial of equal protection of the laws. Therefore, a real and vital disfinction is presented between Reece and the case at bar.

Second. The State Court followed the general rule which has been applied and approved in the federal courts holding that a petitioner cannot complain if he fails to allege or show prejudice or that the grand jurors were incompetent or disqualified. Irregularities in the selection of grand juries have been disregarded generally. **United States. v. Glasser** (7th C. C. A. 1940), 116 Fed. 2d 690, Modified on Other Grounds (1941), 315 U. S. 60, 86 L. Ed. 680, 62 S. Ct. 457, Rehearing Denied (1951), 315 U. S. 827, 86 L. Ed. 1222, 62 S. Ct. 629.

The same rule prevails in at least three other circuits. **Wolfson v. United States** (5th C. C. A. 1900), 101 Fed. 430; **Moffat v. United States** (8th C. C. A. 1916), 232 Fed. 522; Wuichet v. United States (6th C. C. A. 1925), 8 Fed. 2d 561, Certiorari Denied (1926), 270 U. S. 651, 46 S. Ct. 351, 70 L. Ed. 781. Technical objections to the formation of grand juries are generally disfavored. Thus, the rule has been stated that injury or prejudice must be alleged. **Hyde v. United States** (D. C. 1911), 225 U. S. 373, 32 S. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614.

Third. As pointed out by the Supreme Court of Tennessee, the state rule has long been established and consistently followed that Section 40-1501, Tennessee Code

Annotated, is directory and not mandatory. **Pybos v. State** (1842), 22 Tenn. 49; Workman v. State (1857), 36 Tenn. 425; **Epperson v. State** (1880), 73 Tenn. 291. The non-federal ground upon which these cases was decided was applied in the case at bar. Consequently, it cannot be successfully argued that this decision is arbitrary. The petitioner has neither suggested nor intimated that the State Court adopted its view of the matter to evade a federal constitutional issue. Instead, the reasoning used and result reached in this instance are both the pattern and the fabric of state law.

Fourth. The petitioner has attacked the State's application of the de facto doctrine. If this insistence is correctly understood, the petitioner assails the State Court's decision of state law. This clearly was within the province of the State Court. In disposing of this case, the State Court need not have gone further than adopt the rule announced in **Glasser** or reiterate the rule of its earlier cases. However, after adopting the rule of Glasser and holding that Section 40-1501, Tennessee Code Annotated, is merely directory, the State Court held that the grand jury was at least a de facto body. In recognizing the de facto rule, the State Court rejected the dictum of **Roberts v. State**, 147 Tenn. 328, 247 S. W. 101, where it was said there could be no such thing as a de facto grand jury. The effect of the Court's adoption of the de facto rule is to adhere to its former holdings to the effect that the Code Section is merely directory. Assuming that the Court had previously held that the Code Section is mandatory, and must be strictly construed, it follows that a valid indictment could be returned only by a de jure grand jury. Therefore, the Court elected to go further for the sake of consistency in state law and to clarify its own opinions. In doing so, the State Court announced a rule which has long been recognized in other jurisdictions. As pointed out in the opinion, the Roberts case is the only one in the United States declaring that there is no such thing as a de facto grand

jury. If the State Supreme Court had accepted the dictum of Roberts, the Court in substance would have reversed its earlier decisions in Pybos, Workman, and Epperson. These are questions of state law and can only be adjudicated by the state courts. They in nowise present substantial federal questions, and, hence, are not problems which this Court should be called upon to consider and decide.

Fifth. The other arguments advanced by the petitioner deal with various aspects of state law which have nothing whatever to do with a substantial federal question nor applicable decisions of this Court.

CONCLUSION.

In conclusion, the respondent respectfully insists that the petition should be dismissed for the reasons stated above and the reasons and authorities contained in the opinion of the Supreme Court of Tennessee.

Respectfully submitted,

JAMES M. GLASGOW,
Assistant Attorney General,
Attorney for the State of Tennessee,
Post office address:
Supreme Court Building,
401 Seventh Avenue, North,
Nashville 3, Tennessee.

Of Counsel:

GEORGE F. McCANLESS,
Attorney General,
Supreme Court Building,
Nashville 3, Tennessee.

Certificate of Service.

The undersigned, a member of the Bar of the Supreme Court of the United States and the counsel of record for

the respondent, hereby certifies that on the .... day of September, 1958, he served the within and foregoing reply brief upon the petitioner, James J. Flynn, in the following manner as prescribed by Rule 33, Revised Rules of the Supreme Court of the United States: He deposited at the post office in Nashville, Davidson County, Tennessee, two copies each of the within and foregoing reply brief securely enclosed in an envelope, airmail postage duly prepaid, addressed to each of the following at his post office address as stated below, that is to say:

Honorable W. E. Hendrix,
Attorney at Law,
Columbian Mutual Tower,
Memphis Tennessee.

Honorable John M. Heiskell,
Attorney at Law,
Commerce Title Building,
Memphis Tennessee.

.....

James M. Glasgow,
Attorney for Respondent.